IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE SIDE JURISDICTION

LETTERS PATENT APPEAL NO. 372 OF 2000

IN

WRIT PETITION NO. 4673 OF 1999.

Pandurang Ishwara Khamkar and Anr. ... appellants.

Vs.

Shri Venkatesh Ramchandra Hasabnis & 4 ors. ... respondents.

Mr. S. G. Deshmukh, Advocate for the appellants.
Mr. G. M. Salunkhe, Advocate for the respondents Nos. 1 to 5.

CORAM :- SMT. RANJANA DESAI AND
SMT. V. K. TAHILRAMANI, JJ.

DATE ON WHICH THE JUDGMENT
RESERVED :- 3RD OCTOBER, 2006.

DATE ON WHICH THE JUDGMENT
DELIVERED :-12TH OCTOBER, 2006.

JUDGMENT :- (PER SMT. RANJANA DESAI, J.)

1. In this Letters Patent Appeal, original petitioners

have challenged the judgment and order dated 23/08/2000 rendered by the learned single Judge of this Court in Writ Petition No. 4673 of 1999. By the impugned order, the learned single Judge has dismissed the writ petition filed by the appellants challenging the order passed by the Tenancy Awal Karkun, Shirala dated 25/02/1992, order dated 22/09/1995 passed by the Assistant Collector, Walwa Division, Islampur and order dated 26/02/1999 passed by the Maharashtra Revenue Tribunal at Kolhapur.

2. We must narrate the facts which gave rise to the instant petition and appeal. The agricultural lands involved in this case are situated in village Devwadi (Mangle), Taluka shirala, District Sangli. They could be described as under:-

Sr. No.	***Survey No.***	***Gat No.***	***Area***
1.	299/7	13/7	0A 33G
2.	299/6	--	0A 03G
3.	304/1	14/1	1A 18G

The appellants filed an application under Section 70(b) of the Bombay Tenancy and Agricultural Lands Act 1948, ("The Tenancy Act" for short) for a declaration that they were tenants in respect of 1/3rd

portion in the aforesaid agricultural lands (“Suit Lands” for short) owned by Ramchandra Narayan Hasabnis, the father of respondents Nos. 1 to 3 herein, prior to the mortgage, dated 12/05/1969. The appellants also sought a declaration that the appellants' tenancy had revived after the redemption of the said mortgage. The said application was filed on 07/01/1992 and the case was numbered as Tenancy Case No. 16 of 1992.

3. The respondents resisted the said application by filing their written statement. The respondents contended that the suit lands had been mortgaged to the appellants by conditional sale. Regular Civil Suit No. 46 of 1981 had been filed for redemption of the said mortgage by the respondents. The said suit was decreed in favour of the respondents. Regular Civil Appeal No. 497 of 1984 filed by the appellants challenging the said judgment and decree was dismissed. Second Appeal No. 529 of 1991 filed by the appellants challenging the dismissal of the appeal was dismissed by this Court. The respondents contended that the deed of redemption of mortgage has been executed through the Court and respondents have taken possession of the suit lands on 23/03/1992. Accordingly Mutation Entry No. 773 was

effected in record of rights. The respondents contended that Civil Court has decided the issue of tenancy and therefore, there was no question of considering it again.

4. On behalf of the appellants, it was contended that the Civil Court was not competent to decide the issue of tenancy and therefore, observations if any of the Civil Court are not conclusive on the question of tenancy. It was contended that Tenancy Court alone could decide the issue of tenancy.

5. The Tenancy Awal Karkun vide his judgment and order dated 25/02/1992 rejected the appellants application holding that the tenancy rights had been decided by the Court earlier, and therefore, it was not proper to again make enquiry under Section 70 (b) of the Tenancy Act.

6. Being aggrieved by the said judgment and order, the appellants preferred Tenancy Appeal No. 9 of 1995 before the Assistant Collector, Walwa Division, Islampur. The Assistant Collector concurred with the Tenancy Awal Karkun. He dismissed the appeal, filed by the appellants, by his judgment and order dated 22/09/1995. Being

aggrieved by the said judgment and order, the appellants preferred Revision No. MRT/SS No. 96 of 1995 before the Maharashtra Revenue Tribunal at Kolhapur. The Tribunal held that the appellants had not produced any documentary evidence to show that they were in actual possession of the suit lands at any time as tenants. The appellants had not given any particulars of their alleged tenancy and therefore, the Civil Courts have concurrently held that there was no prima facie case of tenancy made out by the appellants. The Tribunal held that the application filed by the appellants under Section 70(b) of the Tenancy Act has rightly been dismissed.

7. Being aggrieved by the said judgments, the appellants preferred Writ Petition No. 4673 of 1999 in this Court. While dismissing the Writ Petition, the learned Single Judge has observed that the Tribunal's finding that there are no pleadings, as to when the tenancy was created, who created the tenancy and on what terms tenancy was created, needs no interference by this Court in its extra ordinary jurisdiction under Article 227 of Constitution of India. The learned single Judge thus, dismissed the Writ Petition. In this Letters Patent Appeal, the said judgment and order is challenged.

8. We have heard at some length Mr. S. G. Deshmukh,

learned counsel appearing for the appellants. Mr. Deshmukh, contended that Section 85 of the Tenancy Act specifically bars the jurisdiction of the Civil Court to settle, decide or deal with any question including a question whether a person is or was at any time in the past, a tenant and whether any such tenant is or should be deemed to have purchased from his landlord the land held by him, which is by or under the Tenancy Act required to be settled, decided or dealt with by the Mamlatdar or Tribunal, a Manager, the Collector or the Maharashtra Revenue Tribunal in appeal or revision or the State Government in exercise of their powers of control. Mr. Deshmukh contended that, therefore, it was not open to the Civil Court to give any finding on the question of tenancy of the appellants. He submitted that the Tenancy Courts have rejected the application of the appellants under Section 70 (b) of the Tenancy Act on the ground that the issue of tenancy is decided by the Civil Courts and that the appellants were never in possession, prior to mortgage-deed and they had lost their possession after the redemption of mortgage-deed was executed through the Court. Mr. Deshmukh contended that these are irrelevant considerations. Only

the tenancy Courts could have upon perusal of the revenue record

decided the question as to whether the appellants were tenants or whether their tenancy was revived after redemption of mortgage. Mr. Deshmukh contended that since Civil Court had no jurisdiction to opine on the question of tenancy, observations of the Civil Court should not have weighted with the Tenancy Courts and in any case principles of res-judicata are not applicable to the said observations. Mr. Deshmukh submitted that as of today, no tenancy Court has considered the appellants claim of tenancy on merits. It was therefore necessary for the Tenancy Courts to consider the application of the appellants under Section 70(b) of the Tenancy Act on merits. Mr. Deshmukh submitted that in the circumstances, the impugned judgment and order be set aside and the matter may be remanded to the Trial Court for disposal, in accordance with law.

8. The Learned counsel for the respondents, on the other hand, contended that no interference is necessary with concurrent finding of fact recorded by the Courts below. He submitted that in the written statement, filed by the appellants in the Civil Court, no particulars of alleged tenancy were given by the appellants and therefore, the Civil

Court was not duty bound to refer the issue of tenancy to the Tenancy

Court. He submitted that, if the appellants claim of tenancy was genuine, the appellants ought to have challenged the order of the Civil Court declining to frame the issue of tenancy. The appellants did not challenge the said order. The learned counsel pointed out that belatedly after their Second Appeal was dismissed by this Court on 22/10/1991 that the appellants filed an application under Section 70(b) of the Tenancy Act before the Tenancy Court. This delay, according to the learned counsel, disentitles the appellants from getting any relief from this Court. The learned counsel contended that in any case, the appellants do not have any evidence in support of their alleged tenancy. This Court has also observed that the appellants have failed to make out their case, that they are tenants of the suit lands. The learned Counsel contended that in the circumstances the impugned judgment and order, merits no interference.

9. We have given our anxious consideration to the submissions advanced by both sides. Admittedly the appellants were put in possession of the suit lands, upon execution of deed of mortgage on 12/05/1969. The first respondent filed Regular Civil Suit No. 46 of

1981 in the Court of 2nd Joint Civil Judge, Sangli for the redemption of

suit lands. In the written statement filed in the said suit, the appellants inter-alia contended that they were in possession of the suit lands as tenants. The learned Judge considered the pleadings and the evidence of the parties. He specifically observed that the appellants had not produced any evidence to prove that they were in possession of the suit lands as tenants. The appellants did not examine themselves. They did not produce any documentary evidence. In the circumstances, the Civil Court held that the respondent had proved that, the suit lands had been mortgaged with the appellants on 12/05/1969 under conditional sale-deed. The Civil Court ordered the appellants to execute a deed of re-conveyance of the suit lands in favour of the respondents.

10. In the appeal, carried by the appellants from the said judgment and decree it was contended before the lower appellate Court that since in the written statement the appellants had taken a contention that they are in actual possession of the suit lands in their capacity as tenants, it was necessary for the trial Court to frame issue regarding tenancy. It was argued that, since no such issue was framed, the suit should be remanded to the trial Court. The learned Judge

observed that Exhibit 19 was a mortgage-deed and not a conditional

sale-deed as alleged by the appellants. He further observed that it is nowhere mentioned in the said mortgage-deed that prior to the execution of this mortgage-deed dated 12/05/1969 the appellants were in actual possession of the suit lands as tenants. The learned Judge further observed that no documentary evidence was produced by the appellants to show that they were in actual possession of the suit lands at any time as tenants. The learned Judge, further, observed that since the appellants had not given any particulars of their alleged tenancy, no issue can be framed in respect thereof. In the circumstances, the appeal was dismissed on 18/04/1990. Second Appeal filed by the appellants challenging the said judgment and order was dismissed by this Court on 22/10/1991. This Court observed that point regarding tenancy was argued and the Courts below found that the appellants had failed to make out any prima facie case. This Court put its seal of approval by saying that there was no error committed by the Courts below. The Second Appeal was thus, dismissed.

11. The above judgments of the Civil Court, which are confirmed by this Court, clearly indicate that the appellants did not

produce any evidence as regards their alleged tenancy. In fact, the appellants did not even examine themselves. It is true that it is only the

Tenancy Court which can decide whether a particular person is a tenant or not, but the issue of tenancy has not to be framed for the asking. The person claiming tenancy, must lay a foundation for his claim. He must give particulars of the alleged tenancy. He must state when the tenancy was created, who created it and on what terms tenancy was created. Frivolous claim of tenancy cannot be entertained by the Civil Court. A Civil Court is under no obligation to frame an issue of tenancy when material particulars of alleged tenancy are absent in the pleadings. Therefore, the Civil Court can not be faulted for not having framed the issue of tenancy.

12. In this connection we may refer to **Thomas Antony Vs. Varkey Varkey (2000)1 Supreme Court Cases 35**, where the Supreme Court was considering the provisions of Kerala Land Reforms Act 1963. Under the scheme of that Act when a question regarding status of a person as a tenant arises in any suit or proceedings before a civil court that court has to refer the matter to the Land Tribunal for a decision on

that question only. On receipt of the decision of the Tribunal on the question, the Civil Court has to decide the suit or proceedings

accepting the decision of the Tribunal on the question referred to it. The Supreme Court observed that, while making a reference to the Tribunal mandatory the legislature cannot be said to have intended that even a patently frivolous, malafide and illegal plea of tenancy taken by a party merely to delay the proceeding and to remain in possession of the property is also to be referred to the Tribunal. The Supreme Court clarified that the said statutory provisions envisaged the case where a bonafide and legally sustainable plea of tenancy is taken by the party, that question shall be referred to the Tribunal.

13. In **Pandu Dhondu Yerudkar and another Vs. Ananda Krishna Patil, AIR 1975 Bombay, 52,** while considering Section 85-A of the Tenancy Act, this Court has held as under:-

"When a vague plea is made by the defendant contending that he is a tenant of the land, the Court should hesitate to frame such an issue on such a vague plea, unless the defendant is able to give particulars showing the time when the tenancy was created, the person by whom it was created and the terms on which it was created. If in

spite of such particulars being asked for the defendant is unable to furnish the same, the Court should not raise an issue on a vague plea that he, the defendant, is a tenant of any particular piece of land."

14. In **Pulmati Shyamlal Mishra V. Ramkrishna Gangaprasad Bajpai, 1981 M. L. J. 321** while dealing with similar question, this Court observed as under:-

"The Civil Court under section 85-A of the Bombay Tenancy and Agricultural Lands Act, 1948 is not under any obligation to frame and remit an issue of tenancy mechanically merely on the same being raised in the written statement, without judicial satisfaction of its necessity and justification. Cases can be conceived when tenancy plea may appear to be patently frivolous, fraudulent and part of the dilatory strategy, and may not by itself attract sections 85 and 85-A of the Bombay Tenancy and Agricultural Lands Act".

15. The same view is again reiterated by this court in **Ramu Shivappa Agalave and others Vs. Imam Kashim Pathan and others in 1992(3) Bom. 560**. In this case, this Court has further gone on to say that it is the duty of the Court to examine the substance and refuse

to frame and remit issue of tenency if the same appeared to

be demonstrably, frivolous and malafide. This Court, observed that facts in a given case would rarely fail to furnish the required indication to the judicial trained mind.

16. In **Uttam Deshmukh and others Vs. Yamunabai Bhoyar and others, 1998(4) Bom. C. R. 441** the written statement did not contain material facts and material particulars constituting the plea of tenancy and the documents on record did not support the bald contention of tenancy. This Court observed that it becomes the bounden duty of the Court while framing issue to ascertain on the basis of the pleadings viz. plaint and written statement and material placed on record which can be considered for the purposes of framing of the issue under Order 14 of the Civil Procedure Code as to whether issue arises and/or whether the parties are at issue on particular point. This Court held in the facts before it that the written statement did not contain material facts and further material particulars constituting the plea of tenancy and the documents on record did not support the bald contention of tenancy and therefore the Court had rightly not framed the issue. In our opinion, if the present case is examined in the light of

the above judgments, no fault could be with the Civil Court for not framing the issue of tenancy and referring it to tenancy Court.

17. Besides, appellants never challenged the order of the Civil Court refusing to frame issue of tenancy. The finding of the Civil Court was confirmed by this Court by its order dated 22/10/1991 passed in Second Appeal No. 529 of 1991. The appellants did not challenge this order in the Supreme Court. That order has, therefore, assumed finality.

18. We also find substance in the observations of the Civil Court that there is nothing on record to show that prior to the execution of mortgage-deed, dated 12/05/1969, the appellants were in actual possession of the suit lands as tenants. It is obvious that, they were put in possession by reason of the mortgage-deed. After the suit was decreed and the appeal carried therefrom was dismissed, the possession of the suit lands has been handed over to the respondents by the Court. In the absence of any other evidence to substantiate the claim of tenancy, it is difficult to find fault with the impugned judgments and orders. It is pertinent to note that the mortgage-deed is dated 12/05/1969. The suit filed by the respondents was decreed on

17/10/1984, Appeal carried therefrom was dismissed on 18/04/1990 and the Second Appeal filed challenging the said order was dismissed on 22/10/1991. On 07/01/1992 the appellants preferred an

application under Section 70(b) of the Tenancy Act to the Tenancy Court for declaration of their tenancy rights. If the appellants had any evidence of their tenancy, it is not understood why in the written statement, filed in the Civil Suit, they have not made reference to it. It is almost after 12 years, having lost the battle in the Civil Court that the appellants have approached the Tenancy Court obviously, to defeat the orders passed by the Civil Courts which are confirmed by this Court. It is pertinent to note that the Tribunal has after perusing the relevant file observed that on the date of the filing of the application under Section 70(b) of the Tenancy Act, there was no documentary evidence like 7/12 extracts which would prima facie lead one to believe that there was any transaction of tenancy. After perusing the record, the Tribunal has observed that the appellants had not come out with any better case than the one they were canvassing while raising their defence in Regular Civil Suit No. 46 of 1981. It is rightly observed by the Tribunal that when the Civil Court refused to frame an issue, the appellants could have rushed

to the Tenancy Court for declaration of tenancy. The appellants did not do so but chose to wait for about 12 long years. They filed application almost after the Civil Litigation had ended.

19. In the facts and circumstance of the case, therefore, in our opinion, there is no substance in this Letters Patent Appeal and hence it is dismissed.

(SMT. RANJANA DESAI, J.)

(SMT. V. K. TAHILRAMANI, J.)